No. 01-618

Supreme Court, U.S.
FILED
AUG 5 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

—v.—

JOHN D. ASHCROFT,
in his official capacity as Attorney General,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF THE SONGWRITERS GUILD OF AMERICA CONCERNING FIRST AMENDMENT ISSUES AND IN SUPPORT OF RESPONDENT

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August 5, 2002

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of The Songwriters Guild of America ("the Guild"), the largest, oldest, and one of the most prominent American organizations representing the creators of one of our nation's greatest resources—its music.[1] Founded in 1931, the Guild is an unincorporated voluntary association of approximately 5,000 songwriters, which includes the estates of more than 600 deceased songwriters throughout the country. The Guild is run exclusively by and for songwriters and has been helping songwriters further their professional interests for over seventy years. Among other things, the Guild has helped its members draft and review contracts, collect royalties, audit music publishers, and renew copyrights. Its members have included creators of words and music that have resonated throughout our history.

The Guild's membership list reads like a *Who's Who* of music, and has included such renowned composers and lyricists as Burt Bacharach, Samuel Barber, Otis Blackwell, Sammy Cahn, Johnny Cash, Ray Charles, Nat "King" Cole, Bob Dylan, Duke Ellington, Dorothy Fields, Randy Goodrum, Marvin Hamlisch, Oscar Hammerstein II, Sheldon Harnick, Waylon Jennings, Quincy Jones, Burton Lane, Michel Legrand, Henry Mancini, Melissa Manchester, Barry Manilow, Johnny Mercer, Cole Porter, Richard Rogers, Elie Seigmeister, Stephen Sondheim, Barbara Streisand, Billy Taylor, and George David Weiss. The Guild's members' musical repertoires read like a list

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[1] No counsel for any party to this case authored this brief in whole or in part. The American Society of Composers, Authors and Publishers ("ASCAP"), the National Music Publishers Association ("NMPA"), and Broadcast Music, Inc. ("BMI") have each contributed money for the preparation and submission of this brief. In addition, the parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk of Court.

of American music classics—from Broadway hits to classic rock to jazz and rhythm and blues. The list includes Rogers and Hammerstein's "Oh What a Beautiful Morning"; George David Weiss' "The Lion Sleeps Tonight"; Marvin Hamlisch's "The Way We Were"; Stephen Sondheim's "Send In the Clowns"; Johnny Mercer and Henry Mancini's "Moon River"; Sheldon Harnick and Jerry Bock's "Sunrise Sunset"; Jerry Leiber and Mike Stoller's "Jail House Rock"; Cole Porter's "Night and Day"; Ervin Drake's "It Was a Very Good Year"; Gus Kahn's "It Had to Be You"; Richard Adler's "You Gotta Have Heart"; Barry Manilow's "Daybreak"; Ray Charles' "Hit the Road Jack"; Bob Dylan's "Blowin' In the Wind"; and innumerable more.

For more than a century, the world has been listening to distinctly American music. Ragtime, Jazz, Big Band, Pop, Rock, R & B, Soul, Metal, and Grunge have all been adopted and imitated around the world, and all are American sounds. Just as America has a unique place in contemporary music, music has a unique place in the American experience. Americans wake to the sound of their clock-radio, drive to work listening to their favorite FM station, then use their (or their employers') computers as CD players. We wake, work, live and love to the sound of music.

Music is not only a highly personal expressive choice, it is also a medium for the American discourse in the core speech areas of politics and religion. The depression-era social protest songs of Woody Guthrie and Pete Seeger grew out of Hillbilly, the first musical style broadcast to a national audience via radio in the 1920s. *See A National Culture?, available at* http://xroads.virginia.edu/~1930s/RADIO/c_w/essay3.html. Songs like *This Land is My Land* express social criticism at the same time they embrace love of country, and broadcast their entreaties to a mass audience.

Since that time, popular music and political music have been closely related. By the 1930s and '40s, Jazz was both the popular music of nightclubs and dancehalls, and a vehicle for political critique. An early example is Lewis Allen and Billy Holliday's 1938 *Strange Fruit*:

> "Southern trees bear strange fruit
> Blood on the leaves and blood at the root
> Black bodies swinging in the southern breeze
> Strange fruit hanging from the poplar trees."

By the end of the 1960s, music was a primary medium for political communication by and to young people, through anthems such as Crosby, Stills & Nash's *Ohio*, written about the May 4, 1970 killings of four student protesters at Kent State University and Creedence Clearwater's *Fortunate Son*, written about the fact that the children of the powerful will likely never have to fight in a war. *See* John Fogerty, Rolling Stone Interview, *available at* http://www.cc.jyu.fi/~petkasi/ccr-jcf/trivia.htm. Music even ventured into journalism. In 1976, Bob Dylan had a number one hit with *Hurricane*, about a convicted murderer later exculpated.

Contemporary popular music is often political speech set to a beat; the stories told are political stories. 10,000 Maniacs' *Please Forgive Us*, written at the time of the Iran-Contra scandal, contained this message: "When they're so apt to wrap themselves up in the stripes and stars and find that they are able to call themselves heroes and to justify murder by their fighters for freedom. . . . Please forgive us; we didn't know." *See* Harold DeMuir, *Zoo Hours: Natalie Merchant and 10,000 Maniacs Enter a Dark Period*, BAM, Aug. 11, 1989, *available at* http://gdrmusic.com/atnatalie/library/bmz/890811b.htm.

As Americans are often both religious and musical, our religious practices incorporate music too. Many cul-

tures use music in religious ceremonies, but in the genres of Revival, Gospel and Soul, music is both a media for the communication of religious ideas and an act of religious devotion. *See* Roger Hall, *Religion in Song: The Craftsmanship of Shaker Music*, Shaker J., June 1999, *available at* http://home.att.net/~shakercrafts/docs/hall.html; Ken Curtis *et al.*, *Charles Wesley: Heart of the Evangelical Revival*, 29 Glimpses, *available at* http://www.gospelcom.net/chi/GLIMPSEF/Glimpses/glmps029.shtml. Music is as much a symbol of American freedom as our religious tolerance. When Americans Jews smuggled religious texts into the Soviet Union for *refuseniks*, they also brought blue jeans and Rock 'n Roll albums with them.

Music is used both as an element of our national rituals, and an emblem for entire periods in our history. Just as no baseball game may begin without *The Star Spangled Banner*, no American can hear *We Shall Overcome* without recalling the moment when America looked at itself, was unhappy with what it saw, and changed for the better. In songs such as *God Bless America*—rediscovered and revived to rally the nation in the aftermath of September 11th—and in other songs throughout our history, *The Battle Hymn of the Republic* and *Let's Remember Pearl Harbor* to name only two, we are stirred and inspired.

As writers of songs, the members of the Guild care deeply about both the protections and benefits afforded under the Copyright Act and the First Amendment. The Guild's members have always had a strong interest in —and have vigorously advocated for—both a strong First Amendment and hardy copyright protection for its members. As songwriters, the Guild's members have been historically among those who exercise their First Amendment rights to provide social commentary and stimulate open, robust debate about issues of social

importance. At the same time, the Guild's members—and their families—rely on the copyright protections provided to them by Congress, often using the royalties from their work to provide for their families and/or to fund their future creative endeavors.

The Copyright Term Extension Act ("CTEA") serves to protect the works of many of the Guild's songwriters, many of whose works would have fallen into the public domain in or shortly after 1998 were it not for the CTEA. Among those many works at risk of entering the public domain if the CTEA is struck down are "Baby Face" by Harry Akst and Benny Davis; "Indian Love Call" by Otto Harbach, Rudolph Friml, and Oscar Hammerstein II; "Dinah" by Harry Akst, Joe Young, and Sam H. Lewis; "June Night" by Abel Baer and Cliff Friend; "I Love My Baby (My Baby Loves Me)" by Harry Warren and Bud Green; "You're the Cream in My Coffee" by B.G. DeSylva, Lew Brown, and Ray Henderson; "Who's Sorry Now?" by Ted Snyder, Harry Ruby, and Bert Kalmar; "Swinging Down the Lane" by Isham Jones and Gus Kahn; "Minnie the Mermaid" by B.G. DeSylva; "Manhattan" by Lorenz Hart and Richard Rodgers; "Yes Sir! That's My Baby" by Walter Donaldson and Gus Kahn; "Let's Do It (Let's Fall in Love)" by Cole Porter; "Stardust" by Hoagy Carmichael and Mitchell Parish; and "Yes! We Have No Bananas" by Irving Cohen and Frank Silver.

The Guild is deeply interested in ensuring that copyright protections afforded to its members under the CTEA are upheld so as to encourage artists—including the Guild's members—to continue producing creative works. As a party uniquely interested in both a strong and protective First Amendment and a strong and protective copyright law, the Guild submits this brief *amicus curaie* to address the First Amendment challenge to

the CTEA in this case. The Guild urges the Court to uphold the constitutionality of the CTEA.

SUMMARY OF ARGUMENT

Copyright law, virtually by definition, affects speech. It is meant—its very purpose is—to encourage the creation of speech by providing, in the language of the Constitution, "for limited Times to Authors . . . exclusive Right to their . . . Writings . . . ." U.S. Const. art. I, § 8, cl. 8.

In establishing the Copyright Clause, the Framers conclusively determined what petitioners and their *amici* allies would have this Court subject to continuing reconsideration: that copyright protection does indeed "promote the Progress of . . . useful Arts." In this case, petitioners challenge the particular time period that Congress determined copyright protection should be afforded—20 more years in the CTEA than in the statute previously in effect. According to petitioners, that time period is excessive since it will not sufficiently "promote" the "progress" of "useful arts" to outweigh the harm to free expression it will supposedly inflict.

But this is far from the approach taken in the Constitution itself or in the caselaw of this Court. This Court has repeatedly made plain that any congressional determination as to the length of time of copyright protection should be treated with a particularly high level of deference. In cases as antique as *Pennock* v. *Dialogue*, 27 U.S. 1, 17 (1829), the Court said in so many words that the period of time for which copyright protection could be given was "subject to the discretion of congress." In later cases, this and other courts have made plain that it is not the role of the judiciary "to alter the delicate balance Congress has labored to achieve" when it determines what "limited period" of copyright protection should be

granted. *Stewart* v. *Abend*, 495 U.S. 207, 230 (1990). On the basis of cases of this sort alone (there are none to the contrary), the Guild submits that this Court should defer to Congress's determination.

Application of rational basis scrutiny could accomplish this since even petitioners make no claim that the CTEA would fall under such review. The thrust of this brief *amicus curiae*, however, is that the Court should take the approach it has consistently taken in this and related areas of focusing on the special characteristics of the law with which First Amendment interests are said to conflict in determining how to weigh the competing interests at issue.

We do not suggest that copyright law is or ever has been "exempt" or "immune" from First Amendment review. A copyright law that invariably prohibited the use at all of copyright language would likely be unconstitutional; so would a law that sought not only to protect expression but the facts and ideas communicated by that expression. This Court has repeatedly observed that the First Amendment requires copyright law to contain certain built-in First Amendment-like protections such as the fair use doctrine and the idea/expression dichotomy, concepts that provide the necessary breathing space required by First Amendment precepts while still permitting the copyright law to achieve its intended end of promoting the arts.

This brief argues that however the Court articulates the standard it is applying, the intermediate scrutiny standard articulated by this Court in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994), filled as it is with the imposition of heavy burdens on the government, is wholly inconsistent with the deference due a congressional determination of the amount of years a copyright should persist. We approach this in a variety

of ways. In addition to the rulings of this Court dictating that a high degree of deference should be granted to congressional decisions as to the amount of years of copyright protection, other rulings governing defamation and right of publicity claims both suggest that laws of this sort that undoubtedly affect and, to some extent, limit speech should be addressed not simply by categorizing the scope of review as "rational," "intermediate" or "strict" but by focusing on the nature of the area of law at issue and then assuring that First Amendment interests are accommodated—if they can be—within the framework of that body of law. In the areas of defamation and right of publicity law, that is precisely what this and other courts have done. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964); *Comedy III Productions, Inc.* v. *Gary Saderup, Inc.*, 21 P.3d 791, 810 (Cal. 2001), *cert. denied*, 122 S. Ct. 806 (2002).

Copyright is a particularly apt area for such an approach since its function is to serve as an "engine of free expression." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). It does this by promoting creativity through a delicate balanced system that protects the expression of those that create it by limiting for "limited times" that of those who would copy it.

The type of intermediate scrutiny proposed by petitioners and their *amici* supporters would call into question the validity of all copyright law. If intermediate scrutiny were to apply, then the type of economic incentive analysis done by the Economists' *amicus* brief submitted in support of petitioners[2] could easily be used to subject the duration—and, indeed, even the existence of—any copyright law to far more exacting scrutiny than

[2] *See* Brief of George A. Akerlof, *et al.* as *Amici Curiae* in Support of Petitioners (hereinafter "the Economists' *Amici* Brief").

either this Court or the Founders ever intended. This Court, under such an approach, could be required to perform an economic analysis to test the Framers' own determination that copyright law does indeed "promote" the arts. That outcome is inconsistent with both the Framers' intentions and this Court's rulings.

ARGUMENT

I. BOTH THE COPYRIGHT CLAUSE AND THIS COURT'S PRECEDENT REQUIRE A DEFERENTIAL STANDARD OF REVIEW OF LAWS GOVERNING THE DURATION OF COPYRIGHT

Congress' determination as to the duration of copyright has never been subjected to the type of intermediate scrutiny proposed by petitioners and their *amici*. The existence of the Copyright Clause itself, U.S. Const. art. I, § 8, cl. 8, evidences the Framers' conclusion that copyright's limited monopolies were not only consistent with free speech principles, but actively promoted them. *See Harper & Row*, 471 U.S. at 558 ("[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression.").

In this vein, both this Court and numerous courts of appeals have concluded that a court's review of the Congress' decision on the duration of copyright must be highly deferential. As long ago as *Pennock v. Dialogue*, 27 U.S. 1 (1829), this Court concluded that the Copyright Clause of the Constitution contemplates that the monopolies provided by copyright law "shall exist but for a limited period, and *that the period shall be subject to the discretion of congress*." *Id.* at 16-17 (emphasis added). In *Stewart v. Abend*, the Court explicitly stated that judicial review of Congress' choice about the duration of the copyright term should be deferential. Noting that, over the years, Congress had devised a number of

different copyright schemes governing the duration of the copyright term, the Court concluded that:

> "This evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in attempting to 'secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings." U.S. Const., Art. I, § 8, cl. 8. . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve."

Stewart, 495 U.S. at 230. Numerous courts of appeals have agreed. In *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980), for example, the Fifth Circuit, in finding that a copyright subsists even in a work that is obscene, noted the limited nature of judicial review of copyright laws generally:

> "Congress has authority to make any law that is 'necessary and proper' for the execution of its enumerated Article I powers, . . . including its copyright power, and the court's role in judging whether Congress has exceeded its Article I powers is limited."

Id. at 860.[3] *Accord Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982).

Judicial review of copyright laws must thus be carefully limited—far more so than the application of any

[3] The correct ruling in *Mitchell Bros.* might, after this Court's ruling in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), have been phrased differently since it now appears under *R.A.V.* that a copyright law that determined which works are copyrightable based on their subject matter might for that reason alone violate the First Amendment. *Id.* at 388. That would certainly be the case if (as one example in *R.A.V.* suggests) copyright protection were unavailable for obscene works "which include[ ] offensive political messages." *Id.* In such circumstances, copyright law would be subjected to First Amendment scrutiny of a sort not called for in this case.

heightened scrutiny test would permit. One way to accomplish this would simply be to apply rational basis scrutiny to this case. But as we set forth below, we believe it is more consistent with the Court's prior determinations in this area to adjudicate First Amendment challenges to copyright law by taking into account the First Amendment function served by that law itself and by assuring that certain First Amendment-accommodating substantive provisions are contained within it. This approach has been applied successfully by this Court and others in the copyright arena, and in other areas of First Amendment law, including both defamation and right of publicity law. There is no need to abandon it now.

II. THE CTEA DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE COPYRIGHT LAW CONTAINS SUFFICIENT FREE SPEECH PROTECTIONS TO SATISFY THE FIRST AMENDMENT

It has long been noted by courts and legal scholars alike—at least since Professor Melville Nimmer's seminal law review article on the subject—that there is an apparent tension or paradox between copyright law and the First Amendment. *See generally* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. Rev. 1180, 1180-86 (1970). But courts have almost universally noted that that tension can be resolved by the enforcement of certain other doctrines of copyright law, such as the idea/expression dichotomy and the fair use doctrine, that not only help accommodate important First Amendment interests, but to assure that copyright serves as an "engine of free expression." *See Harper & Row*, 471 U.S. at 558. As both this Court and others have noted, courts have generally rejected First Amendment

challenges to copyright laws because the substantive provisions of and doctrines embodied in copyright law themselves resolve the apparent tension between copyright and the First Amendment in a manner that adequately protects First Amendment interests. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577-78 n.13 (1977) ("We note that Federal District Courts have rejected First Amendment challenges to the federal copyright law on the ground that 'no restraint [has been] placed on the use of an idea or concept.' ") (citation omitted); *Eldred v. Reno*, 239 F.3d 372, 376 (D.C. Cir. 2001) ("Although there is some tension between the Constitution's copyright clause and the first amendment, the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression.") (quoting *United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989)). *See also* Floyd Abrams, *First Amendment and Copyright*, 35 J. Copyright Soc'y 1, 3-4 (1987). The familiar categories of strict, intermediate, and rationally-related review have thus generally not been applied to First Amendment challenges to copyright; rather, courts have applied First Amendment scrutiny by assuring that copyright law, which itself exists to promote freedom of expression, contains provisions that adequately protect First Amendment interests.

Petitioners and their *amici* urge this Court to overturn this settled body of law and subject all copyright laws to the intermediate scrutiny test set forth by this Court in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661-62 (1994). In arguing for this radical change, petitioners and their *amici* seize upon the court of appeals' statement in its opinion below in this case that "copyrights are categorically immune from challenges under the First Amendment." *Eldred*, 239 F.3d at 375. In so

doing, petitioners and their allied *amici* misconstrue the main thrust of the decision below and set up a straw man to argue against. For while the statement of the court of appeals, standing in isolation, might be subject to challenge if First Amendment principles were not required to be taken account of in copyright law itself, those principles are already—and, indeed, must be—accommodated by copyright law. There is no basis for maintaining that still additional First Amendment tests must be applied.

A. This Court and Others Have Repeatedly Held that Copyright Law Contains Sufficient Substantive Protections of Free Speech Interests to Satisfy the First Amendment

Copyright law has long been subjected to First Amendment scrutiny that requires certain substantive protections of free speech interests within the regime of copyright itself. Thus, courts—including this one—have generally found copyright laws to satisfy First Amendment scrutiny because doctrines such as the idea/expression dichotomy and the fair use doctrine adequately accommodate free expression interests.

1. The Idea/Expression Dichotomy Adequately Safeguards Freedom of Speech Interests

It is one of the most fundamental principles of copyright law that copyright cannot protect an author's ideas, but rather protects only the expression of those ideas. *See Baker v. Selden*, 101 U.S. 99, 105-07 (1879); codified at 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."); *see also* Nimmer, 17 U.C.L.A.

L. Rev. at 1189. As this Court has observed on several occasions, it is partly through this idea/expression dichotomy that copyright embodies the First Amendment's underlying principles of encouraging the free exchange of ideas and stimulating robust and open debate. *See, e.g., Harper & Row*, 471 U.S. at 556 (noting that "copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression' ") (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 203 (2d Cir. 1983)); *New York Times Co. v. United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring) (copyright laws do not infringe on freedom of speech because copyright protects only the form of expression and not the idea itself). Leading commentators have likewise observed that copyright serves to fuel First Amendment interests—even though it limits some forms of speech—largely because of this idea/expression distinction. As Professor Nimmer put it:

> "In general, the democratic dialogue—a self-governing people's participation in the marketplace of ideas—is adequately served if the public has access to an author's ideas, and such loss to the dialogue as results from inaccessibility to an author's 'expression' is counterbalanced by the greater public interest in the copyright system."

1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.10[C][2] (2002). It is exposure to ideas—and not to one particular form of expression—that predominantly promotes First Amendment values. *Id.*

Courts have taken into account copyright's accommodation of First Amendment principles through the idea/expression dichotomy when subjecting federal

copyright laws to First Amendment scrutiny. As this Court has made plain, First Amendment challenges to copyright laws have generally been rejected precisely because the copyright laws' idea/expression dichotomy adequately protects First Amendment interests. *See Zacchini*, 433 U.S. at 577 n.13 (noting that lower courts have rejected First Amendment challenges to federal copyright laws because copyright law puts no restraints on the use of an idea or concept). *See also United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989) ("Although there is some tension between the Constitution's copyright clause and the first amendment, the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression."); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263-64 (11th Cir. 2001) ("In copyright law, the balance between the First Amendment and copyright is preserved, in part, by the idea/expression dichotomy. . . ."); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1115 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001) ("The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts.").

2. The Fair Use Doctrine Adequately Safeguards Freedom of Speech Interests

The doctrine of fair use also provides built-in First Amendment protections in copyright law. Under that doctrine, "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (2000). The exceptions to copyright carved out under the fair use doctrine go to the heart of the First Amendment, as they

allow speakers to use not only the ideas of other authors but also their copyrighted expression in order to introduce new ideas or concepts to the public or to further certain fundamental First Amendment interests, such as news reporting, criticism, parody, and education.

In determining whether a particular use of a work constitutes a fair use, the factors to be considered include "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2000). These factors are meant to be illustrative, rather than exhaustive, and "[a]ll [of the four factors] are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994). One of the central purposes courts have considered in performing the fair use analysis is also a central purpose of the First Amendment—namely, ensuring "the free flow of ideas—particularly criticism and commentary." *Suntrust Bank*, 268 F.3d at 1268.

Hence, in *Campbell*, this Court upheld on fair use grounds a parody of the Roy Orbison song "Pretty Woman" that was performed by a rap group without permission of the copyright owner. The Court held that parody, although not specifically listed in § 107, is a form of "comment and criticism" that may constitute a fair use of the copyrighted work being parodied. *Campbell*, 510 U.S. at 579. The Court's accommodation of First Amendment values in its fair use analysis was straightforward. In analyzing the "purpose and character of the use," the Court acknowledged that the "Pretty Woman" parody was published for profit—a factor weighing

against a finding of fair use—but held that this fact was overshadowed and outweighed by the highly transformative use of the song. "[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.* "[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works." *Id.* The relevant inquiry here is whether or not the new work adds something new to the old one, "altering the first with new expression, meaning, or message." *Id.* While "transformative use is not absolutely necessary for a finding of fair use," this Court noted in *Campbell* that "the more transformative the new work, the less will be the significance of other factors. . . ." *Id.* at 580-81.

In *Suntrust Bank*, the Court of Appeals for the Eleventh Circuit similarly stressed the importance of the transformative nature of a parody of the classic book *Gone With the Wind* in finding at the preliminary injunction stage that the parody was likely to survive a copyright challenge on the basis of a fair use defense. *Suntrust Bank*, 268 F.3d at 1269-71. The court of appeals there found that the parody was a highly transformative use, and that finding informed the court's analysis of all the fair use factors. *Id.* at 1271.

Consistent with and underlying the decisions discussed above, this Court has emphasized that the fair use doctrine itself provides copyright law with built-in First Amendment protections. In *Harper & Row*, this Court held that The Nation's advance publication of excerpts from the copyrighted memoirs of former President Gerald Ford infringed Time, Inc.'s copyright in those memoirs. *Harper & Row*, 471 U.S. at 569. In doing so, the Court observed that the doctrine of fair use—like that of the idea/expression dichotomy—provided significant "First Amendment protections" that were "embodied in

the Copyright Act[ ]" itself. *Harper & Row*, 471 U.S. at 560. In light of these First Amendment protections, the Court declined to expand the concept of fair use to create what the Court described as a "public figure exception to copyright." *Id.*

Not surprisingly, courts of appeals (including the court of appeals in this case) have repeatedly concluded that the First Amendment protection embedded in the fair use doctrine—like that in the idea/expression dichotomy—suffices fully to protect First Amendment interests. *See, e.g., Eldred,* 239 F.3d at 376 (works subject to "the latter half of the 'idea/expression dichotomy' " and "subject to fair use" do not require further inquiry under the First Amendment); *Suntrust Bank*, 268 F.3d at 1264-65 ("Because of the First Amendment principles built into copyright law through the idea/expression dichotomy and the doctrine of fair use, courts often need not entertain related First Amendment arguments in a copyright case."); *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) ("We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine."); *Los Angeles News Service v. Tullo*, 973 F.2d 791, 795 (9th Cir. 1992) ("First Amendment concerns are also addressed in the copyright field through the 'fair use' doctrine. . . .").

In the copyright context, then, First Amendment scrutiny has not come in the form of application of intermediate scrutiny, as petitioners urge, but by assuring that the statute has enough play in it to accommodate First Amendment interests. Thus, this Court did not apply intermediate scrutiny in *Harper & Row* when determining whether or not a First Amendment defense allowed The Nation to copy excerpts from former President Ford's memoirs. Rather than asking whether or not the

copyright law furthered an important government interest unrelated to the suppression of free speech, and whether the incidental restriction on expression was no greater than necessary to further that interest, as the Court would have if it were applying intermediate scrutiny, this Court instead merely considered (and rejected) the notion that the public importance of the excerpts might have had some bearing on whether or not they were a fair use of the copyrighted excerpts. *Harper & Row*, 471 U.S. at 555-60.

Similarly, courts of appeals have generally declined to apply intermediate scrutiny—or any such test—to First Amendment challenges to copyright. As the Court of Appeals for the District of Columbia has observed, "[c]ases in which a first amendment defense is raised to a copyright claim do not utilize an *O'Brien* analysis." *United Video*, 890 F.2d at 1190. Rather, "the familiar idea/expression dichotomy of copyright law . . . has always been held to give adequate protection to free expression." *Id.* at 1191.

B. The Intermediate Scrutiny Test Proposed by Petitioners Has Not Been Applied in Related Areas of Law

Copyright law is not the only area of law that has been subjected to First Amendment review by assuring the incorporation of First Amendment protections into the substantive law rather than subjecting each statute in that area to either strict, intermediate, or rationally-related First Amendment review. Like copyright law, the law of defamation and that relating to the right of publicity have both been subjected to First Amendment review without reference to the particular level of scrutiny to be applied and with focus instead on the substantive First Amendment law to be applied. It is simply not true—as petitioners and their *amici* suggest—that all

laws that directly impact speech are automatically subject to either intermediate or strict scrutiny.

In *New York Times v. Sullivan*, 376 U.S. 25[illegible], (1964), this Court held that the First Amendment requires "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.' " *Id.* at 279-80. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), this Court further imposed constitutional requirements on criminal defamation statutes, requiring a finding that false statements made about public officials were made with knowledge of their falsity or with reckless disregard of whether or not they were false, before criminal liability could be imposed. *Id.* at 75-76. It is significant that, even though the Alabama and Louisiana defamation laws at issue in those cases are undoubtedly content based, this Court did not apply strict scrutiny to determine their constitutionality. Like copyright, the appropriate First Amendment-sensitive resolution to challenges to the constitutionality of the defamation statutes lay in assuring that they incorporated certain constitutionally required substantive provisions of law.

It has been recognized that the imposition of strict, intermediate, or rationally-related scrutiny on defamation law would also lead to paralyzing doctrinal confusion. Consider the "fact/opinion dichotomy" found in libel law. That distinction serves much of the same First Amendment-protective function as the idea/expression dichotomy and fair use doctrine in copyright law. Significantly, the distinction is content based. While this Court has determined that the First Amendment does not require a separate "opinion privilege" limiting the application of state defamation laws, *see Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), it did hold that only the assertion of false statements of fact are subject to redress

under libel law, *id.* at 19-21, and in doing so it assured—without the slightest reference to strict scrutiny—that libel law sufficiently accommodated First Amendment interests. As one commentator has noted:

> "While the First Amendment does require that state defamation law be limited to false assertions of 'fact,' American courts have never held that the actual doctrinal content of the 'fact-opinion' distinction as it exists in defamation law is subject to the overriding 'macro-doctrine' of First Amendment 'strict scrutiny.' Indeed, any such attempt would result in utter doctrinal chaos. Thus, it has always been understood that the substance of the 'fact-opinion' doctrine itself supplies the First Amendment standard. From a First Amendment perspective, the Supreme Court requires that states impose defamation liability only for false statements of fact; beyond that minimum, states are left to themselves to craft the precise contours of the 'opinion' defense. The methodology of 'strict scrutiny' (or even 'intermediate scrutiny,' for that matter) is simply irrelevant. A similar mechanism operates in copyright law. While the Supreme Court has stated that the idea-expression dichotomy and the fair use doctrine eliminate any tension between copyright law and the First Amendment, the Supreme Court and the uniform jurisprudence of the lower courts have never treated the First Amendment as an independent font of detailed copyright doctrine (or even intimated such a principle), but instead has assumed that sufficient protection for freedom of speech inures in the structure of copyright law itself."

Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 Nw. U. L. Rev. 1099, 1158-59 (2002).

The law of the right of publicity provides another analogy. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), this Court made clear that an Ohio state law providing for a cause of action for the right of publicity—which provided that a person could not use another's name or likeness for commercial gain without permission—was not immune from First Amendment scrutiny. But once again, the Court did not apply strict scrutiny (or even intermediate scrutiny, for that matter) to right of publicity law, even though it undoubtedly restricted speech on the basis of content. Rather, it applied a more deferential standard of review, acknowledging the careful balance that right of publicity laws strike in order to promote creative activities.

In *Zacchini*, a television station broadcast Mr. Zacchini's entire human cannonball act—approximately 15 seconds long—without Zacchini's permission. *Id.* at 563-64. The question before this Court was whether the First Amendment required the recognition of a "newsworthiness" privilege broad enough to immunize the television station from a right of publicity claim resulting from its unauthorized broadcast of the performance. *Id.* at 565-66. The Court declined to find such a privilege, noting that the protections provided by the right of publicity worked to foster and enhance First Amendment values in much the same way that copyright does:

> "Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court."

Id. at 576.

Notably, those courts that have subjected right of publicity laws to First Amendment scrutiny have devised a test that—like that used in copyright law—requires the inclusion of First Amendment-protective elements in the law rather than subjecting the right of publicity laws to either intermediate or strict scrutiny. The California Supreme Court has provided the most extensive opinion on the matter to date in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001), *cert. denied*, 122 S. Ct. 806 (2002).

In *Comedy III*, the registered owner of the rights to the former comedy act known as The Three Stooges sued an artist who, without permission, had sold lithographs and T-shirts bearing a likeness of The Three Stooges reproduced from a charcoal drawing he had made. *Id.* at 800-01. The artist claimed that enforcement of California's right of publicity statute against him under the circumstances violated his First Amendment rights. *Id.* at 802. As this Court did in *Zacchini*, the California Supreme Court analogized the right of publicity to copyright, concluding that "[t]he right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility." *Id.* at 804. The court further noted that the right of publicity, like copyright, shares a common goal with the First Amendment of encouraging free expression and creativity. *Id.* at 808. Like copyright, it accomplishes that goal, in large part, "by protecting the creative fruits of intellectual and artistic labor." *Id.*

In crafting a First Amendment test for the right of publicity, the California Supreme Court considered and rejected the suggestion of many commentators that the doctrine of fair use be incorporated wholesale from copyright law into right of publicity law. *Id.* at 807-08. The court did, however, incorporate part of the fair use inquiry—specifically, the part that inquires whether or not the use in question is "transformative." *Id.* at 808

(citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). The court concluded that "when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements . . . ." *Id.* at 810.

The Tenth Circuit read a similar First Amendment defense into an Oklahoma right of publicity statute in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996). In that case, the court found a trading card company's First Amendment rights provided a parody defense to a right of publicity claim stemming from the sale, without the permission of the baseball players union, of trading cards with caricatures of major league baseball players on them. The court argued by analogy to copyright, which it noted, has "built-in mechanisms that serve to avoid First Amendment concerns of this kind"—specifically, a fair use exception that applies to parody. *Id.* at 970. The court applied a "balancing test" of the First Amendment rights of the card company with the right of publicity of the baseball players and concluded that the First Amendment required a parody defense on the facts of that case. *Id.* at 976.

It is telling that, even though both the California and Oklahoma right of publicity statutes directly restricted the content of certain people's speech, neither court applied strict scrutiny. Rather, both courts assured that a substantive First Amendment defense was available in the right of publicity statutes themselves. In the intellectual property context—where free expression is often paradoxically promoted by restricting some speech—this

is both the dominant and most sensible First Amendment approach.[4]

Application of intermediate or strict scrutiny tests to any of these arenas, including copyright, would lead (in Professor Smolla's language) to "utter doctrinal chaos." Smolla, 96 Nw. U. L. Rev. at 1159. Consider that the two doctrines that courts have held to accommodate free speech interests in copyright—the idea/expression dichotomy and the fair use doctrine—are both heavily laden with content distinctions. If petitioners and their *amici* are right about the appropriate method for determining the appropriate standard of review for copyright laws, then those provisions of existing copyright law providing for the idea/expression dichotomy and the fair use doctrine—*i.e.*, 17 U.S.C. § 102(b) (idea/expression dichotomy) and 17 U.S.C. § 107 (fair use)—would be subjected to strict scrutiny. The fair use doctrine and the idea/expression dichotomy both allow certain exemptions from copyright that take into account, among other things, the content of the expression copied. Yet it has never even been seriously suggested that strict scrutiny applies to those doctrines. Rather, Congress and the courts have taken the opposite approach—namely, that the doctrines of fair use and the idea/expression dichotomy themselves provide the accommodation of First Amendment interests that is required of copyright laws.

The multi-tiered scrutiny tests simply do not fit comfortably within the realm of copyright. The doctrine of applying heightened scrutiny to judge specific laws

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[4] This Court's recent analysis of Congress' effort to impose criminal penalties on virtual child pornography is noteworthy. In *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), the Court held the Child Pornography Prevention Act of 1996 unconstitutional for failing to comport with the First Amendment principles without even adverting to (or *sub silentio*, applying) strict scrutiny.

impacting upon fundamental speech rights arose to fill a void—and address a concern—that does not exist in copyright. Cases that employ heightened scrutiny do so out of their concern that fundamental speech rights not be impeded. But within the copyright context, the baseline for judging is already much different as copyright is recognized as an ally to First Amendment interests themselves.

The intermediate scrutiny test proposed by petitioners and their *amici* would also lead to absurd results. Petitioners and their economist *amici* argue that the CTEA is unconstitutional because the benefits of the 20-year term increase are too speculative a gain to satisfy the intermediate scrutiny test of *Turner*, which requires that a regulation not burden substantially more speech than necessary. If petitioners are right about the correct standard of review, then the government would have the burden of affirmatively showing that the duration of the term does not withdraw substantially more works from the public domain than is necessary to "promote" the arts.

But how is one to determine whether a copyright term of life-plus-fifty years (or seventy) withdraws more works from the public domain than is necessary to promote the arts? Or whether making a term extension retroactive will encourage sufficient artistic output for the collective good when compared to the corresponding delay of other works entering the public domain? Or whether the societal benefits of substantially conforming America law with that of the European Union by providing copyright protection of life-plus-seventy years outweighs the social benefits of placing previously copyrighted works in the public domain? Or, indeed, whether the benefits to the creative processes of *any* copyright law outweigh their costs? These decisions were either made by the Framers themselves or left by them for

Congress to make, subject to only the most limited judicial review. Nothing in First Amendment law requires any different result.

CONCLUSION

The CTEA does not violate the First Amendment. Because copyright law will continue to be an "engine of free expression" if the CTEA is upheld, the First Amendment challenge to the CTEA should be rejected.

Dated: New York, New York
August 5, 2002

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